Supreme Court of the United States

No. [illegible]

[illegible]

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No.

FRANO BATISTIC,

Petitioner,

vs.

ALVA L. PILLIOD, District Director, Chicago District, United States Department of Justice, Immigration and Naturalization Service,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Frano Batistic, prays that a writ of certiorari be issued to review the decision and judgment order of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW.

The order of the United States District Court for the Northern District of Illinois, Eastern Division, entering summary judgment in favor of the respondent, Alva L. Pilliod, and dismissing the complaint for declaratory judgment was entered on April 4, 1960, and is reported in

Batistic v. *Pilliod*, D.C.E.D. Ill., 188 F. Supp. 344 (1960). The Court's memorandum, and its findings of fact and conclusions of law are reproduced in the certified record transmitted herewith. (R. 55-67)

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming the decision of the District Court was filed January 13, 1961, and is reported in 286 F.(2d) 268 (1961), and is set forth in Appendix A *infra*. Petition for Rehearing *En Banc* filed by the petitioner was denied on February 10, 1961. It, also, is set forth in Appendix A *infra*.

On February 14, 1961, the United States Court of Appeals, for the Seventh Circuit, on motion of this petitioner made pursuant to Rule 28 of that Court, stayed the issuance of its mandate for thirty days, for the purpose of allowing said petitioner to petition this Court for Certiorari. On March 7, 1961, the United States Court of Appeals, for the Seventh Circuit, on motion of this petitioner made pursuant to Rule 28 of that Court, stayed the issuance of its mandate to and including the 14th day of April 1961, for the purpose of allowing said petitioner to petition this Court for Certiorari. A copy of said orders are contained in Appendix A *infra*.

JURISDICTION.

This petition is filed within ninety days of the denial of the Petition for Rehearing by the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED.

1. Where Section 243(h) of the Immigration and Nationality Act of 1952, 8 U.S.C. §1253(h), vests discretion in the Attorney General, may a Court exercise judicial

review of the administrative ruling where the petitioner alleges a violation of due process of law?

2. In determining whether the administrative order refusing to withhold petitioner's deportation is sufficient on its face, can it be said that due process of law is fully satisfied by the mere granting of a hearing?

STATUTE INVOLVED.

IMMIGRATION AND NATIONALITY ACT OF 1952.

"Sec. 243(h), 8 U.S.C. 1253(h). The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."

STATEMENT OF THE CASE.

This declaratory judgment action was brought under the provisions of 28 U.S.C. Section 2201. The Petitioner initiated the suit as a result of a denial of his application to stay the order of deportation pursuant to Section 243(h) of the Immigration and Nationality Act of 1952, 8 U.S.C. §1253. Alva L. Pilliod, District Director, Chicago District, United States Department of Justice, Immigration and Naturalization Service, is the respondent as the delegated head of the administrative agency issuing the order.

Petitioner is a 19-year old, single, male alien, who is a native and citizen of Yugoslavia. He was admitted into the United States on April 14, 1958, as a non-immigrant visitor for pleasure, but failed to depart upon the expiration of his visa. On January 26, 1959, he was ordered

deported under Section 241(a)(2) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1251, on the ground that after admission as a non-immigrant visitor, he had remained longer than permitted. The Petitioner's deportation was directed to Yugoslavia.

On January 29, 1959, Petitioner submitted an application to withhold deportation under Section 243(h) of the Immigration Act of 1952, 8 U.S.C. 1253. An interrogation on Petitioner's application was held on February 25, 1959, before a Special Inquiry Officer of the Immigration Service (R. 25-51).

Petitioner was present at the interrogation, and represented by Counsel, was examined by the Inquiry Officer, and presented witnesses on his behalf. On March 30, 1959, the Special Inquiry Officer recommended that Petitioner's application to withhold deportation be denied (R. 19-24), and on April 21, 1959, the Regional Commissioner of the Immigration and Naturalization Service denied Petitioner's application (R. 17-18).

A complaint for declaratory judgment was filed in the United States District Court for the Northern District of Illinois on May 6, 1959, seeking judicial review of the Regional Commissioner's order (R. 3-7). On September 8, 1959, defendant filed his motion for summary judgment (R. 14-15) and the Immigration and Naturalization Service Certified Record (R. 16-54).

The District Court on April 4, 1960 granted defendant's motion for summary judgment and dismissed the Complaint (R. 68). Appeal was taken to the United States Court of Appeals for the Seventh Circuit (R. 69).

On January 13, 1961, the said Court of Appeals affirmed the judgment of the District Court, holding that under Section 243(h) of the Immigration and Naturaliza-

tion Act of 1952, 8 U.S.C. §1253, the petitioner was granted a proper hearing, and had a fair opportunity to present his case; that the order refusing to withhold deportation was sufficient on its face; that there was no error of law in the proceedings below; that the Court could not substitute its judgment for that of the Attorney General; and that the petitioner had not been denied procedural due process. (Appendix A, pp. 1a-3a)

REASONS FOR GRANTING THE WRIT.

This Court should exercise its jurisdiction in this case for the following reasons:

1. There is involved herein an important question concerning the protections afforded an individual under due process of law, and whether the granting of a hearing in and of itself under Section 243(h) of the Immigration and Nationality Act of 1952, 8 U.S.C., Section 1253(h) fully satisfies due process of law.

2. It is hereby prayed that this Court review the decision of the United States Court of Appeals for the Seventh Circuit, for it is contended by the petitioner that this decision is in direct conflict with decisions of various Courts in that the United States Court of Appeals for the Seventh Circuit has failed to judicially review an order of the Attorney General which is insufficient on its face.

I.

WHERE THE PETITIONER ALLEGES THAT HE HAS BEEN DENIED DUE PROCESS OF LAW, THERE EXISTS A RIGHT OF JUDICIAL REVIEW.

Despite the fact that Section 243(h) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1253(h), gives discretion to the Attorney General to withhold deportation if

"in his opinion the alien would be subject to physical persecution", nevertheless there exists a right of judicial review of discretionary decisions of the Attorney General. This right of judicial review of discretionary decisions of the Attorney General is derived "from the Fifth Amendment to the Constitution of the United States which prohibits a deprivation of liberty or property without due process of law." *Chavez* v. *McGranery*, S.D., Calif., 1952, 108 F. Supp. 255, 257, affirmed 220 F. (2d) 857.

II.

JUDICIAL REVIEW MAY DETERMINE WHETHER THE DECISION OF THE ATTORNEY GENERAL IS SUFFICIENT ON ITS FACE.

An issue presented in this case is whether the decision of the Attorney General to deny the petitioner relief under Section 243(h) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1253(h), is sufficient on its face.

It is submitted that in view of the evidence presented by the petitioner and his witnesses, that the decision of the Regional Commissioner (R. 17-18), and the recommendation of the Special Inquiry Officer (R. 19-24) is insufficient on its face and amount to an abuse of administrative discretion.

In the instant case, the petitioner, and witnesses on his behalf, presented evidence which indicated that the petitioner and his family have been anti-Communist prior to and since the coming of the Communists into Yugoslavia. (R. 32, 35, 40, 41, 49, 50)

The petitioner who is now of draft age, seeks a stay of deportation upon the ground that he fears physical persecution if deported to Yugoslavia.

The Regional Commissioner, in denying the plaintiff a stay of deportation, stated:

> "In addition to his general claim of physical persecution on account of religious and political beliefs, this applicant has advanced and stressed the further claim that he will be physically persecuted while undergoing his military training in Yugoslavia by being assigned to some obscure post or camp. This claim must be rejected as pure conjecture on the part of the applicant as he certainly has no advance knowledge of how, when or where he will undergo military training or even if he will undergo such training at all." (R. 18)

These conclusions are completely contrary to the evidence presented by Dragoljub Djurovic concerning the obligation of duty required to be served in the Yugoslav Army and the conditions under which anti-Communists are forced to serve. (R. 45-46) It should be noted by this Honorable Court that no evidence was presented by the Attorney General and his delegates to contradict the testimony of the petitioner and that of his witnesses who testified on his behalf.

It should further be noted by this Honorable Court that while Mr. Djurovic spent twelve months in "Little Siberia", petitioner would be required to spend at least eighteen months and very likely two or three years at slave labor.

To be forewarned is to be prepared. The testimony of Mr. Nick Batistich, Mr. Djurovic, and Mr. Gavranovich, illustrate in no uncertain terms the fate of anti-Communists in Yugoslavia today. Where the uncontradicted evidence presented by the petitioner so overwhelmingly confirms his worse fears, should he be deported, the

solution is not to allow the petitioner to be removed from the sanctuary of our beloved shores with the hope that the worst will not come to pass, but to make certain that these injustices will not occur, by allowing petitioner a stay of deportation.

Petitioner maintains, however, that in view of the uncontradicted evidence presented on his behalf, humanitarian reasons alone need not be considered by this Honorable Court.

Although the withholding of deportation under Section 243(h) of the Immigration and Nationality Act of 1952 (Title 8, Section 1253(h) U.S.C.) rests in the administrative judgment and opinion of the Attorney General or his delegate, nevertheless, the Court can intervene to stay deportation if the Attorney General or his delegate refuse to consider the evidence presented by the alien.

As was stated by the Court in the case of *Dolenz* v. *Shaughnessy*, C.A. 2, 1953, 206 F. (2d) 392, at pages 394, 395:

> "Doubtless a court might intervene to stay deportation if the Attorney General or his delegate should deny the alien an opportunity to present evidence on the subject of persecution *or should refuse to consider the evidence presented by the alien.*" (Emphasis added)

In *United States ex rel. Schlimmgen* v. *Jordan*, C.A. 7, 1948, 164 F. (2d) 633, the Court stated at Page 634:

> "Courts may not interfere with administrative determination unless, upon the record, the proceedings were manifestly unfair, or substantial evidence to support the administrative finding is lacking, or error of law has been committed or the evidence reflects manifest abuse of discretion." (Citations omitted)

In *United States ex rel. Beck* v. *Neelly*, C.A. 7, 1953, 202 F. (2d) 221, the Court at page 223 stated:

> "Under the statute the courts may not interfere with the administrative determination unless, upon the record, the proceedings were manifestly unfair or substantial evidence to support the finding is lacking, or error of law has been committed, or the evidence reflects manifest abuse of discretion." (Citing *United States ex rel. Schlimmgen* v. *Jordan, supra*).

In other words, the findings of administrative officials in charge in such cases will be set aside by the Court only upon proof of at least one of these situations." (Citations omitted)

Again in *United States ex rel. Polychronis Paschalidis* v. *District Director of Immigration and Naturalization at The Port of New York*, D.C. N.Y. 1956, 143 F. Supp. 310, Judge Weinfeld stated, in part, at page 313:

> "But broad as the Attorney General's power is under Section 243(h), it is not unrestricted; it is still subject to review by the Courts although the area of review falls within a narrow compass. The Courts may intervene if it appears that the Attorney General or his designee has denied an alien seeking relief the opportunity to present evidence to support his plea *or has refused to consider the evidence presented by him* . . ." (Emphasis added)

In the instant case, the petitioner, and several witnesses who testified on his behalf, presented evidence which indicated that the petitioner would be subject to physical persecution if deported to Yugoslavia. No countervailing evidence was offered by the Government. In view of these facts, it is the petitioner's contention that the decisions reached by the Special Inquiry Officer and the Regional

Commissioner are so contrary to the evidence as to amount to a refusal to consider the evidence so presented.

III.

THE GRANTING OF A HEARING DOES NOT IN AND OF ITSELF SATISFY DUE PROCESS OF LAW.

It is the petitioner's contention that the granting of a hearing, with an opportunity for petitioner to present his case, only satisfies the minimum requirements of due process of law. To have refused the petitioner a hearing on his request for a stay of deportation would have been a most obvious and blatant denial of due process of law. The granting of a hearing, however, does not in and of itself satisfy the many guarantees afforded an individual under the due process clause.

The petitioner has pointed out in Part Two of this petition that in determining whether due process of law has been accorded an individual, the Courts may inquire, even where there is only limited inquiry, into a review of the grounds given by the Attorney General or his delegate for reaching his decision, to determine if the grounds given are sufficient on their face.

The respondent cites many cases to sustain his position that the refusal to withhold deportation by the Attorney General has been upheld by the Courts.

With all due deference and respect to the memorandum opinion of the learned District Judge, and its affirmation by the United States Court of Appeals for the Seventh Circuit, it is maintained by the petitioner that the cases cited and relied on by the Government are to be distinguished from the instant case.

It is further submitted by the petitioner that reasons sufficient on their face were given in these cases by the

Attorney General or his delegate in refusing to withhold deportation.

The decision in the instant case by the District Court, which was affirmed by the United States Court of Appeals for the Seventh Circuit, is a departure from previous cases in that the Court hold in this case that once a hearing has been granted, the requirements of due process of law have been completely satisfied. It is respectfully submitted by the petitioner that if this be the case judicial review is reduced to a mere nullity. All a Court need do is see if a hearing has been granted, and if it has to inquire no further.

When a person's welfare, safety, and maybe even his life are at stake, should the Court hold that due process of law requires only a hearing?

In cases relied on by the respondent, facts brought out at the hearing justified the decision of the Attorney General in refusing to withhold deportation.

In *United States ex rel. Kaloudis* v. *Shaughnessy*, C.A. 2, 1950, 180 F.(2d) 489 the Court, in upholding a refusal by the Immigration Board to grant a suspension in deportation, stated at page 490:

> "The Board gave, as it reason for refusing a suspension, that the alien was a member of an organization appearing on the proscribed list issued by the Attorney General, the International Worker Order."

In *United States ex rel. Dolenz* v. *Shaughnessy*, C.A. 2, 1952, 200 F.(2d) 288, the order of the Attorney General ordering the alien deported to Yugoslavia was upheld. In that case, however, the evidence showed that the alien had been a member of the Communist Party while a native

of Yugoslavia, and had continued such membership after he had landed as a seaman in New York.

In *United States ex rel. Hintopoulos* v. *Shaughnessy*, 1957, 353 U.S. 72, the United States Supreme Court, in upholding the Attorney General's order deporting the petitioner, stated at page 77:

> "Nor can we say that it was abuse of discretion to withhold relief in this case. The reason relied on by the Hearing Officer and the Board—mainly the fact that petitioner had established no roots or ties in this country—were neither capricious nor arbitrary."

In *Namkung* v. *Boyd*, C.A. 9, 1955, 226 F.(2d) 385, in a proceeding to withhold deportation on the ground that the applicant would be subject to physical persecution if deported to Korea, the Court held that a Hearing Officer could forward to the Attorney General, a letter he received from the Korean Consul General stating that there was no basis for the alien's fears if deported to Korea, and that this letter could be considered in arriving at the conclusion that there was no basis for the alien's fears.

These cases vividly illustrate the point that the respective Courts, in reviewing the decision of the Attorney General, felt that it was necessary to produce facts which justified his determination. In no instance was the mere granting of a hearing held to be a justification for a refusal to withhold deportation.

In the instant case, the petitioner and witnesses on his behalf presented evidence which indicated that the petitioner and his family have been anti-Communist prior to and since the coming of the Communists into Yugoslavia. The instant case is, therefore, to be distinguished from

United States ex rel. Kaloudis v. *Shaughnessy*, C.A. 2, 1950, 180 F.(2d) 489, and *United States ex rel. Dolenz* v. *Shaughnessy*, C.A. 2, 1952, 200 F.(2d) 288, wherein the aliens had been or were members of Communist organizations.

No guarantee of this plaintiff's safety is afforded by the Yugoslavian government, as was the guarantee afforded the alien by the Korean Consul General in *Napkung* v. *Boyd*, C.A. 9, 1955, 226 F.(2d) 385.

Unlike the case of *United States ex rel. Hintopoulos* v. *Shaughnessy*, 1957, 353 U.S. 72, and *Kam Ng* v. *Pilliod*, C.A. 7, 1960, 279 F.(2d) 207, the petitioner's relatives in the United States include his uncle and aunt, with whom he lives, and his grandfather's sister (R. 22).

Perhaps, the strongest illustration of the fact that judicial review is not confined to determining solely whether a hearing has been held, is to be found in the case of *United States ex rel. Cantisani* v. *Holton*, C.A. 7, 1957, 248 F.(2d) 737, Certiorari denied, 356 U.S. 932, rehearing denied, 356 U.S. 964. In that case, the petitioner alleged that he would be persecuted by Communists if returned to the Village of Sassano, Province of Salerno, Italy. The Court, in upholding the order of the Attorney General refusing to withhold deportation under Sec. 243(h) of the Immigration and Nationality Act of 1952, 8 U.S.C. Sec. 1253(h), noted at page 739:

> "Furthermore, petitioner has been deported to Italy and not to the Village of Sassano. There is no proof that other places in Italy would not be safe for petitioner. Judicial notice may be taken that the existing government in Italy is controlled by the Christian Democratic Party which has a long record of antagonism to Communism."

Just as the Court took judicial notice of the fact that the Government in Italy is controlled by anti-Communists, it is respectfully submitted that this Court should take judicial notice that Yugoslavia is a Communist country.

It is therefore, contended by the petitioner that in light of these cases, the granting of a hearing does not in and of itself satisfy due process of law.

CONCLUSION.

Wherefore, for foregoing reasons, this petition for writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

SEPTEMBER TERM, 1960—JANUARY SESSION, 1961

No. 13104

FRANO BATISTIC,
Plaintiff-Appellant,
v.
ALVA L. PILLIOD, District Director, Chicago District, United States Department of Justice, Immigration and Naturalization Service,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 13, 1961

Before HASTINGS, *Chief Judge*, DUFFY and CASTLE, *Circuit Judges.*

HASTINGS, *Chief Judge.* Plaintiff is a 19-year old single male alien who is a native and citizen of Yugoslavia. He was admitted into the United States on April 14, 1958 as a non-immigrant visitor for pleasure for the purpose of visiting his uncle. He failed to depart upon the expiration of his visa and is now living here with relatives.

On January 26, 1959, plaintiff was ordered deported pursuant to Section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C.A. § 1251, on the ground that after admission as a non-immigrant visitor, he had remained longer than permitted. His deportation was directed to Yugoslavia. Plaintiff's order of deportation was

not judicially appealed, and it is conceded that he is a deportable alien.

On January 29, 1959, plaintiff filed an application to withhold deportation under Section 243(h) of the Immigration and Nationality Act, 8 U.S.C.A. § 1253, alleging that he will be physically persecuted if deported to Yugoslavia because of his religious and political beliefs. An interrogation on plaintiff's application was held on February 25, 1959 before a Special Inquiry Officer of the Immigration Service who recommended that the application be denied. The Special Inquiry Officer's recommendation was forwarded to the Regional Commissioner of the Immigration and Naturalization Service for decision. On April 21, 1959, the Regional Commissioner denied plaintiff's application.

On May 6, 1959, plaintiff filed his complaint for declaratory judgment in the district court seeking judicial review of the Regional Commissioner's order. On September 8, 1959, defendant[1] filed his motion for summary judgment with a certified record of the proceedings before the Immigration and Naturalization Service. On April 4, 1960, the district court granted defendant's motion for summary judgment. This appeal followed.

We are asked to determine whether the administrative discretion here was exercised in an arbitrary and capricious manner so as to deprive plaintiff of due process of law.

Plaintiff was present at the interrogation, represented by counsel, examined by the Special Inquiry Officer and presented three witnesses on his behalf. Plaintiff testified that he is a Roman Catholic and that it was well known that both he and his family are anti-communists. Although plaintiff always attended religious services, he was never at any time physically persecuted in Yugoslavia for his religious practices and belief. His father was issued a passport, permitted to visit the United States and subse-

[1] Alva L. Pilliod, District Director, Chicago District, United States Department of Justice, Immigration and Naturalization Service.

quently returned to Yugoslavia. There was no claim that he has been physically persecuted since his return. In addition, plaintiff claimed that he will be taken into military service on his return to Yugoslavia and that he will be punished by assignment for army duty in the worst place in that country. Upon consideration of all the testimony, the Special Inquiry Officer concluded that plaintiff will not be physically persecuted if deported to Yugoslavia at this time. Both the Special Inquiry Officer and the Regional Commissioner (in his affirmance) filed written memoranda of their determinations.

We have examined the record before us and find that plaintiff was granted a proper hearing and had a fair opportunity to present his case; that the Attorney General's designate properly exercised his discretion and the order was sufficient on its face; that there was no error of law in the proceedings below; that the court cannot substitute its judgment for that of the Attorney General; and that plaintiff has not been denied procedural due process.

The principles governing these findings have been fully reviewed in recent decisions of this court and need not be restated here. See *Chao-Ling Wang* v. *Pilliod*, 7 Cir., ... F. 2d ..... (December 27, 1960); *Obrenovic* v. *Pilliod*, 7 Cir., 282 F. 2d 874 (1960); *Kam Ng* v. *Pilliod*, 7 Cir., 279 F. 2d 207 (1960); and cases cited therein.

The well-considered memorandum opinion of the district court,[2] with its findings of fact and conclusions of law, demonstrate that plaintiff has had full benefit of the limited judicial review available to him.

The judgment of the district court is affirmed.

AFFIRMED.

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[2] *Batistic* v. *Pilliod*, D.C.E.D.Ill., 188 F. Supp. 314 (1960).

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Friday, February 10, 1961

Before

Hon. John S. Hastings, Chief Judge

Hon. F. Ryan Duffy, Circuit Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Win G. Knoch, Circuit Judge

Hon. Latham Castle, Circuit Judge

FRANO BATISTIC, *Plaintiff-Appellant,* v. ALVA L. PILLIOD, District Director of Immigration, etc., *Defendant-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 13104

It Is Ordered by the Court that the petition for a rehearing of this cause *en banc* be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Tuesday, February 14, 1961

Before

Hon. John S. Hastings, Chief Judge

FRANO BATISTIC, *Plaintiff-Appellant*, v. ALVA L. PILLIOD, District Director of Immigration, etc., *Defendant-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 13104

On consideration of the petition of counsel for plaintiff-appellant,

It Is Ordered that the issuance of the mandate of this Court be stayed for thirty (30) days in accordance with the provisions of Rule 28 of the Rules of this Court.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Tuesday, March 7, 1961

Before

Hon. John S. Hastings, Chief Judge

FRANO BATISTIC, *Plaintiff-Appellant,* v. ALVA L. PILLIOD, District Director of Immigration, etc., *Defendant-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 13104

On consideration of the motion and affidavit of counsel for plaintiff-appellant,

It Is Hereby Ordered that that part of said motion which seeks a stay of the issuance of the mandate of this Court be granted, and the issuance of said mandate is hereby stayed up to and including April 14, 1961, subject to the provisions of Rule 28 of the Rules of this Court.

• • •